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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

THOMAS GARDNER, Individually, and as Executive Director of the Florida Department of Natural Resources, and MAJOR RONALD McCULLERS, Individually, and as Monroe County District IX Supervisor of the Florida Marine Patrol,

Petitioners,

vs.

FREEMAN R. BATEMAN,

Respondent.

Petition For A Writ Of Certiorari To The United States Circuit Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The Petitioners THOMAS GARDNER and MAJOR RONALD McCULLERS filed two (2) separate appeals in the Eleventh Circuit. Appeal Number 89-5851 was the appeal on the merits of the Trial Court Final Judgment dated July 11th, 1989 and reported as *Bateman v. Gardner*, 716 F.Supp. 595 (S.D. Fla. 1989). The second appeal was under Case No. 90-5125 and it concerned the January 12th, 1990 Order Awarding Attorneys Fees and Costs which is reported as *Bat man v. Gardner*, Case No. 87-10062-CIV-KING (S.D. Fla. Jan. 12, 1990).

In the Petitioners' Questions Presented for Review, reference is made only to the January 12th, 1990 Order Awarding Attorneys Fees and Costs. The two (2) separate appeals were combined by the Eleventh Circuit for purposes of oral argument. In the December 20th, 1990 Per Curiam Affirmance, the attorneys fee appeal was affirmed pursuant to the Petitioners' concession both in Motions to the Eleventh Circuit and at oral argument before the Eleventh Circuit.

Respondent FREEMAN R. BATEMAN brought his action in the United States District Court for the Southern District of Florida asserting that a Florida Statute was being enforced in a discriminatory fashion. Mr. Bateman was facing arrest and confiscation of his vessel and catch nearly thirty (30) miles from land in the United States Exclusive Economic Zone. Under the Petitioners' enforcement practices, vessels identical to the Respondent's, registered in other states, would be free to harvest the same

QUESTIONS PRESENTED FOR REVIEW – Continued

federal resources pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq. and its fishery management regulations, 50 C.F.R. § 658 et seq. The District Court in both the Order on the Merits and Award of Attorneys Fees held that there was an equal protection violation. The Petitioners acknowledged that they had no authority under the Magnuson Act to enforce the Florida Statute against non-Floridians outside the state's territorial waters. The District Court held that prohibiting Florida fishermen from fishing within a portion of the United States Exclusive Economic Zone denied equal access of all United States citizens to the federal fishery resources. The federal law permitted shrimping in the area by all United States commercial fishermen, but the Petitioners' application of the Florida Statute prohibited the Respondent FREEMAN BATEMAN from harvesting the federal shrimp resources in the area. The Court held:

> Under the federal regulation, the Plaintiff may take shrimp in the disputed area, while under the state statute, he may not.

This Equal Protection conflict between the state and federal law was the basis for invocation of the Supremacy Clause by the District Court.

The District Court, in its attorneys fee award, made it clear that although the Supremacy Clause *by its own force* did not create rights enforceable under 42 U.S.C. § 1983, the Magnuson Act itself and the Federal Fishery Management Plan adopted under the Act did grant such federal rights. The Court held that the Magnuson Act was

QUESTIONS PRESENTED FOR REVIEW – Continued

enacted to benefit and protect commercial fishermen like the Respondent and that the Act mandated that, "Conservation management measures shall not discriminate between residents of different states". The District Court held that Petitioners' interference with Respondent's equal access to the federal fishery resources was a denial of rights, privileges and immunities that were secured by the Constitution and laws of the United States and that the violation of such federal rights that were implicit in the statute's language and structure was as much a direct violation of a right as was a violation clearly set forth in the text of the statute. The District Court cited this Court's decision in *Golden State Transit Corp. v. City of Los Angeles,* 110 S.Ct. 444 (1989) for this proposition.

In light of the above, the two (2) questions presented by the Petitioners must be supplemented by the following questions. These questions go to the basis of the validity of the Eleventh Circuit's Per Curiam Affirmance on both the merits and the attorney's fees appeals.

QUESTIONS PRESENTED FOR REVIEW – Continued

1.

DOES THE PETITIONERS' ENFORCEMENT OF THE FLORIDA STATUTE WITHIN THE UNITED STATES EXCLUSIVE ECONOMIC ZONE AGAINST FLORIDA REGISTERED VESSELS (OR FLORIDA CITIZENS) CONSTITUTE A VIOLATION OF A FEDERAL "RIGHT TO FISH" WHICH IS EITHER EXPRESS OR IMPLICIT WITHIN FEDERAL LAW OR REGULATIONS?

2.

DOES THE PETITIONERS' ENFORCEMENT OF THE FLORIDA STATUTE WITHIN THE UNITED STATES EXCLUSIVE ECONOMIC ZONE INTERFERE WITH RIGHTS, PRIVILEGES OR IMMUNITIES GRANTED TO ALL UNITED STATES CITIZENS BY THE UNITED STATES CONSTITUTION AND FEDERAL LAW?

3.

DOES THE PETITIONERS' ENFORCEMENT OF THE FLORIDA STATUTE WITHIN THE UNITED STATES EXCLUSIVE ECONOMIC ZONE DEPRIVE THE RESPONDENT OF EQUAL ACCESS TO FEDERAL FISHERY RESOURCES AND THEREBY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

CITATIONS TO OPINIONS AND JUDGMENTS BELOW 1

JURISDICTIONAL STATEMENT 2

Conflicting Circuit Court Opinions 2

Conflict With This Court's Opinions 4

Jurisdictional Conclusion 4

CONSTITUTIONAL AND STATUTORY PROVISIONS 5

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 7

ARGUMENT AGAINST GRANTING THE WRIT ... 8

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Aetna Casualty and Surety Company of Hartford Connecticut v. Kerr McGee Chemical Corporation, 875 F.2d 1252 (7th Cir. 1989) 3

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) 11

Browder v. Director Department of Corrections of Illinois, 434 U.S. 257, 258 (1978) 3

Consolidated Freightways Corp. of Delaware v. Kassel, 730 F.2d 1139 (8th Cir. 1984) Cert. Den., 469 U.S. 834 (1984) 9

Crutcher v. Kentucky, 141 U.S. 47, 57 (1891) 10

Dennis v. Higgins, 111 S.Ct. 865 (1991) ..... *passim*

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) 14

Geer v. Connecticut, 161 U.S. 519 (1896) 4, 14

Golden State Transit Corp. v. City of Los Angeles, 110 S.Ct. 444 (1989) ..... *passim*

H.P. Hood and Sons, Inc. v. DuMond, 336 U.S. 525 at 538, 69 S.Ct. 657 at 665 (1949) 11, 14

Hughes v. Oklahoma, 444 U.S. 322 (1979) 4, 14

North Pacific Vessel Owners Association v. Sheffield, 852 F.2d 572 (Table) (9th Cir. 1988) ..... *passim*

Skiriotes v. State, 197 So. 736 (Fla. 1940) 12, 13

Skiriotes v. Florida, 313 U.S. 69 (1941) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Sorrell v. Commissioner, 882 F.2d 484, 487 n. 11 (11th Cir. 1989) 2

U.S. v. Florida, 425 U.S. 791 (1975) 4, 15

STATUTES:

Federal

16 U.S.C. § 1801 et seq. 15

16 U.S.C. § 1851(4) 7

28 U.S.C. § 1254(1) 5

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1983 (1988) 6

42 U.S.C. § 1983 (1991) 7

FEDERAL CONSTITUTION:

Privileges and Immunities Clause of Amendment XIV, Clause 2, United States Constitution 5

Privileges and Immunities Clause of Article IV, Section 2, United States Constitution 5

OTHER:

50 C.F.R. § 658 et seq. 15

50 C.F.R. § 658.1(b) 15

Ninth Circuit Rule 36-3 ..... 2, 5, 9

Supreme Court Rule 10.1(a) 5

Supreme Court Rule 10.1(b) 5

Supreme Court Rule 10.1(c) 6

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RESPONDENT'S BRIEF IN OPPOSITION

CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The Respondent is satisfied with the Petitioners' Citations to the Opinions Below.

JURISDICTIONAL STATEMENT

Conflicting Circuit Court Opinions

The Respondent FREEMAN R. BATEMAN is strongly opposed to the jurisdictional statement which cites the unpublished Ninth Circuit Opinion in *North Pacific Vessel Owners Association v. Sheffield*, 852 F.2d 572 (Table) (9th Cir. 1988). The citation of this unpublished opinion as "conflicting precedent" is a direct violation of Ninth Circuit Rule 36-3. The Ninth Circuit Rule is non-discretionary and it states that such an Opinion:

> . . . shall not be regarded as precedent and shall not be cited to or by this Court or any District Court of the Ninth Circuit . . .

The Eleventh Circuit in *Sorrell v. Commissioner*, 882 F.2d 484, 487 n.11 (11th Cir. 1989) held that unpublished opinions under Ninth Circuit Rule 36-3 " . . . may not be cited except when relevant under the Doctrine of Law of the Case, Res Judicata, or Collateral Estoppel."

Inasmuch as this Court's Certiorari Review is to determine conflicting cases of *precedent* from different circuits, it is frivolous and therefore, a Rule 11 violation for the Petitioners to attempt to assert such "conflict" based upon a Ninth Circuit unpublished opinion that . . . "shall not be regarded as precedent . . . " and . . . "shall not be cited . . . either in briefs, oral argument, opinions, memoranda or orders . . . ". See Appendix for full text of Rule. The Petitioners' violation of the Ninth Circuit Rule should not be countenanced by this Court.

The Seventh Circuit in *Aetna Casualty and Surety Company of Hartford Connecticut v. Kerr McGee Chemical Corporation*, 875 F.2d 1252, 1255 n.2 (7th Cir. 1989) stated that such unpublished opinions have "no precedential value". The Seventh Circuit clarified its own "unpublished opinion" Rule and stated:

> With respect to the precedential value of opinions of other courts, we may look to the rules of those courts.

It is respectfully submitted that based on the above rules and case law, all references to the Ninth Circuit unpublished opinion in *North Pacific Fishing Vessel Owners Association v. Sheffield*, should be stricken and that this Court should consider sanctions for Petitioners' violation of the Ninth Circuit Rule.

In *Browder v. Director Department of Corrections of Illinois*, 434 U.S. 257, 258 (1978), this Court stated:

> Finally, Petitioner questioned the validity of the Seventh Circuit's "unpublished opinion" rule. We leave these questions to another day. Id. at 258.

If today happens to be the "other" day this Court referred to, it should be noted that the *North Pacific Vessel Owners Association v. Sheffield* case was decided before this Court's Supremacy Clause decision in *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444 (1989) and this Court's Commerce Clause decision in *Dennis v. Higgins*, 111 S.Ct. 865 (1991). The District Court Opinions and the Eleventh Circuit's Per Curiam Affirmance are directly in line and complementary to this Court's decisions in *Golden State* and *Dennis v. Higgins*.

Conflict With This Court's Opinions

The Per Curiam Affirmance of the Eleventh Circuit did not conflict with this Court's decision in *Skiriotes v. Florida*, 313 U.S. 69 (1941). *Skiriotes* is expressly based, in at least four (4) places, on the premises that no conflicting federal legislation existed. The decisions below are in agreement with this Court's decision in *U.S. v. Florida*, 425 U.S. 791 (1975) which held that the State of Florida was not entitled to *any interest* in the natural resources beyond the State's territorial boundaries. The decision below is in agreement with Justice Field's dissent nearly one hundred (100) years ago in *Geer v. Connecticut*, 161 U.S. 519 (1896) when he stated that when a wild animal "becomes an article of commerce . . . its use cannot be limited to the citizens of one state to the exclusion of citizens of another state". Eighty-three (83) years later this Court overruled *Geer* in *Hughes v. Oklahoma*, 444 U.S. 322 (1979). In *Hughes*, this Court concluded that:

> The overruling of *Geer* does not leave the state's powerless to protect and conserve wild animal life *within their borders*. Today's decision makes clear, however that states may promote this legitimate purpose only in ways consistent with the basic principle that 'our economic unit is the nation'. *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525 at 538, 69 S.Ct. 657 at 665 (1949) (emphasis added)

Jurisdictional Conclusion

The Court of Appeals for the Eleventh Circuit Per Curiam Affirmed the District Court without opinion on December 20th, 1990. There is simply no conflicting precedent established by Petitioners' citation of *North Pacific*

Vessel Owners Association v. Sheffield, in violation of the Ninth Circuit unpublished opinion rule, nor is there any conflict with this Court's decision in *Skiriotes v. Florida*. This Court should not issue the Writ of Certiorari to the Court below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Respondent is satisfied with the Petitioners' statement of Constitutional and Statutory Provisions except to add:

> Privileges and Immunities Clause of Article IV, Section 2, United States Constitution;
>
> Privileges and Immunities Clause of Amendment XIV, Clause 2, United States Constitution;
>
> Ninth Circuit Rule 36-3;
>
> The above cited constitutional and statutory provisions are set out verbatim in the Appendix hereto.

This Court should not grant discretionary review of this case because the Per Curiam Affirmance by the United States Court of Appeals for the Eleventh Circuit is not a decision which conflicts with any other decision of a Court of Appeals on the same matter [Sup. Ct. R. 10.1(a)]. The Per Curiam Affirmance does not raise an important question of federal law which remains outstanding in light of this Court's decisions in *Golden State* and *Dennis v. Higgins*, [Sup. Ct. R. 10.1(b)]. And finally, the Eleventh Circuit's Per Curiam Affirmance of the District Court Orders on the merits and attorneys fees did

not decide any federal question which conflicts with any applicable decision of this Court [Sup. Ct. R. 10.1(c)].

STATEMENT OF THE CASE

The Respondent agrees to a great extent with the Statement of the Case by the Petitioners; however, it should be pointed out that the District Court decision did *not* rest on Preemption, but Petitioners' denial of Respondent's equal access to federal fishery resources of the United States Exclusive Economic Zone. In the District Court decisions it was pointed out that the "problem which is of the greater concern to this Court" was the unequal treatment of persons from different states with regard to the harvest of federal fishery resources outside the state's territorial waters. In the Order Awarding Attorneys Fees and Costs, the District Court made it clear that although the Supremacy Clause, of its own force, does not create rights enforceable under 42 U.S.C. § 1983 (1988), the Magnuson Act does not preclude a § 1983 remedy since there is no mechanism in the Act to address state interference with the federally protected fishing rights. The Magnuson Act itself is inextricably involved with interstate commerce since the harvesting of the federal fishery resources is beyond the territorial limits. All fishery resources harvested under the Magnuson Act begin their journey into the streams of commerce by crossing a state line to the nearest port. The District Court relied on this Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444 (1989) for the proposition that the Magnuson Act contains rights, privileges or immunities which were enacted to benefit and protect

United States commercial fishermen. The Magnuson Act "codified" the Commerce Clause and the Equal Protection Clause by stating that, "Conservation management measures shall not discriminate between residents of different states." 16 U.S.C. § 1851(4).

SUMMARY OF ARGUMENT

Two and one-half (2¹/₁) pages of the three and one-half (3¹/₂) pages of Argument advanced by the Petitioners are devoted to showing conflict with the "precedential authority" of the unpublished Ninth Circuit Opinion in *North Pacific Fishing Vessel Owners Association v. Sheffield*, 852 F.2d 572 (Table) (9th Cir. 1988). In the Respondent's Appendix are a few portions of the unpublished Opinion which the Petitioners forgot to mention. In *Sheffield* the District Court's dismissal order was premised *exclusively* on preemption. Since *Sheffield* was decided prior to *Golden State Transit Corp. v. Los Angeles*, 110 S.Ct. 444 (1989), and *Dennis v. Higgins*, 111 S.Ct. 865 (1991), this Court's clarification of standing to bring a 42 U.S.C. § 1983 action was not available to the Ninth Circuit *even if* the unpublished Opinion had been published and could be cited as conflicting precedent.

Under *Golden State* and *Dennis v. Higgins*, either the Supremacy Clause or the Commerce Clause can be held to confer "rights, privileges and immunities" within the meaning of 42 U.S.C. § 1983 (1991). Both Clauses are substantive restrictions on permissible state regulation and individuals injured by such state action are allowed to sue and obtain injunctive and declaratory relief under

42 U.S.C. § 1983. In both of these recent decisions there are three (3) considerations which determine whether an enforceable "right, privilege or immunity" exists. First the provision must create an obligation binding on the governmental unit as opposed to merely stating a congressional preference. Second, the plaintiff's interests must not be too vague or amorphous to be beyond the judiciary's competence to enforce. And finally, the provision of the Constitution or federal law must have been intended to benefit the plaintiff.

In the District Court Opinions it is clear that the Supremacy Clause, the Commerce Clause and the Magnuson Act itself were designed to benefit individuals such as the Respondent FREEMAN R. BATEMAN. The Petitioners' denial of equal access to the federal fishery resources (open to all United States fishermen under the provisions of the Magnuson Act and Fishery Management Plan) violated the Supremacy Clause, the Commerce Clause, Equal Protection and deprived the Respondent FREEMAN R. BATEMAN of rights, privileges and immunities secured to him by the Constitution and federal statutory law.

ARGUMENT AGAINST GRANTING THE WRIT

THE PER CURIAM AFFIRMANCE OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT "CONFLICT" WITH ANY PRECEDENT ESTABLISHED BY ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME QUESTION OF LAW.

In the first two (2) paragraphs of Argument, the Petitioner cites both this Court's decision in *Dennis v.*

Higgins, 111 S.Ct. 865 (1991) and portions of the unpublished Opinion of the Ninth Circuit in *North Pacific Vessel Owners Association v. Sheffield*, 852 F.2d 572 (Table) (9th Cir. 1988). In *Dennis v. Higgins* this Court pointed out that the mistake made by the Nebraska Supreme Court was in relying on *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), Cert. Den., 469 U.S. 834 (1984) which held that claims under the Commerce Clause are not cognizable under § 1983 because the Commerce Clause . . . "Does not establish individual rights against government, but instead *allocates power between the state and federal governments*". *Consolidated*, 730 F.2d at 1144. (emphasis supplied)

The mistaken reliance by the Nebraska Supreme Court, corrected in *Dennis v. Higgins*, is remarkably similar to the analysis of Commerce Clause and Supremacy Clause by the Ninth Circuit in *Sheffield*. In the unpublished Opinion (which cannot be cited as precedent under Ninth Circuit Rule 36-3), the Ninth Circuit states:

> This Court noted in *White Mountain* that the Commerce Clause was analogous to the Supremacy Clause in that it functions as a *'allocation of power between national and state governments'*, 810 F.2d 849, and does not create individual 'rights, privileges and immunities within the meaning of § 1983'. 810 F.2d at 850 . . . From the plain language of the District Court's denial of their Motion, it is clear that appellants prevailed on the merits of only their Supremacy Clause claims, which itself does not provide a basis for attorneys fees, costs, and expenses under Section 1988. Like their Supremacy Clause claim, appellant's claims under the Magnuson Act and the Commerce Clause do not

> constitute cognizable Section 1983 claims. (emphasis added)

The unpublished Opinion in *Sheffield* came out before the broad construction of § 1983 claims recently required by this Court. The entitlement to § 1983 relief under *Golden State* with regard to the Supremacy Clause and the entitlement to § 1983 relief under the Commerce Clause in *Dennis v. Higgins* amounts to a "right, privilege or immunity" under the ordinary meaning of those terms. *Dennis v. Higgins*, 111 S.Ct. 865 (1991) quoted this Court's decision in *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891) for the proposition that:

> To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and the laws of the United States. *Dennis*, 111 S.Ct. at 871.

The District Court decisions, Per Curiam Affirmed by the Eleventh Circuit, stand for the same proposition as this Court's decisions in *Crutcher v. Kentucky, Golden States,* and *Dennis v. Higgins.*

The Federal District Court, under 42 U.S.C. § 1983, protected the Respondent FREEMAN R. BATEMAN's equal access to the federal fishery resources of the United States Exclusive Economic Zone. Fishing for shrimp under the Magnuson Act and the Fishery Management Plans adopted pursuant to the Act is an explicit or an implied right. It is a right which every United States fishermen is entitled to exercise under the Constitution and laws of the United States. The Respondent's federal fishing activities in the United States Exclusive Economic

Zone, *miles* beyond Florida's territorial boundaries, is a right, privilege and immunity which is binding on the State of Florida. It is a right which is within the competence of the judiciary to enforce and it is a right whose intended beneficiaries include Respondent FREEMAN R. BATEMAN.

After this Court's Opinions in *Golden State* and *Dennis v. Higgins*, the Petitioners cannot argue that the Supremacy Clause and the Commerce Clause do not confer rights within the meaning of 42 U.S.C. § 1983 because they were not designed to benefit individuals, but rather designed to promote national, economic and political union. In *Dennis v. Higgins*, 111 S.Ct. 865, 871 (1991), this Court pointed out that this argument had been "implicitly rejected" in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 321, n.3 (1977).

This Court's Opinion in *Dennis v. Higgins*, 111 S.Ct. 865 (1991) quotes Justice Jackson's Opinion in *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949) for the proposition that:

> Our system, fostered by the Commerce Clause, is that every farmer (fisherman?) and every craftsman shall be encouraged to produce (fish for shrimp?) by the certainty that he will have free access to every market in the nation, that no home embargoes (enforcement of state laws?) will withhold his exports (imports of shrimp caught in the United States Exclusive Economic Zone?) and no foreign state will by customs, duties or regulations, exclude them. Likewise, every consumer may look to the free competition from every producing area in the nation (United States Exclusive Economic Zone?) to protect him from exploitation by any. Such was

> the vision of the founders; such has been the doctrine of this court which has given it reality. *Dennis v. Higgins*, 111 S.Ct. at 872.

The Supremacy Clause, the Commerce Clause and other rights, privileges and immunities secured by federal law prohibit state regulation of federal fishery resources in the United States Exclusive Economic Zone. These prohibitions are the source of a right of action in those injured. The District Court's decisions and the Per Curiam Affirmance by the Eleventh Circuit would be hailed by Justice Jackson as carrying on the vision of the founders of this nation.

THE PER CURIAM AFFIRMANCE OF THE ELEVENTH CIRCUIT DID NOT DECIDE A FEDERAL QUESTION IN A WAY THAT CONFLICTED WITH AN APPLICABLE DECISION OF THIS COURT.

The Petitioner relies upon *Skiriotes v. Florida*, 313 U.S. 69 (1941) for the proposition that . . . "a state regulation of its citizens on the high seas was not an equal protection violation if it applied equally to all persons within the state's jurisdiction." Petitioners' Brief, page 8. An understanding of the issues in *Skiriotes* is necessary in order to put this Court's Opinion in perspective. The Supreme Court of Florida decided *Skiriotes v. State*, 197 So. 736 (Fla. 1940) on the basis that:

> There is no dispute about the facts. It is admitted that the alleged offense was committed within the state if the boundary as fixed by the Constitution of 1885 is controlling . . . Petitioner contends that the marine boundary of the state is fixed by international law at one marine league from shore and that the offense was committed beyond this limit. *Skiriotes*, 197 So. at 737.

The Supreme Court of Florida went on to hold that the western boundary of Florida *was* three marine leagues and that the offense *was* committed within the jurisdiction of the state. *Skiriotes,* 197 So. at 739.

In affirming the judgment of the Florida Supreme Court, this Court stated:

> It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute *so far as applied to conduct within the territorial waters of Florida,* in the absence of conflicting federal legislation, is within the police power of the state. (citations omitted) Nor is there any repugnance in the provisions of the statute to the Equal Protection Clause of the Fourteenth Amendment. The statute applies equally to all persons within the jurisdiction of the state. *Skiriotes,* 313 U.S. at 75.

The Equal Protection analysis in *Skiriotes* pertained to Florida's *territorial* jurisdiction over all persons. It pertained . . . "to conduct within the territorial waters of Florida . . . ". Id. at 75.

Fifty (50) years ago, in *Skiriotes,* Chief Justice Hughes repeatedly pointed out that any extraterritorial enforcement of Florida's laws was valid *only;* if not . . . "modified by superior federal law". Id. at 72; . . . "in the absence of conflicting federal legislation". Id. at 75; . . . "where there is no conflict with Acts of Congress". Id. at 77; . . . "when its action does not conflict with federal legislation." Id. at 78-79.

This Court's Opinion in *Skiriotes v. Florida,* 313 U.S. 69 (1941) seems to have anticipated the exact legal and factual setting as is present in this action. Chief Justice

Hughes stated, "We have not been referred to any legislation of Congress [Magnuson Act?] with which the state statute conflicts". Id. at 74; "No question as to the authority of the United States over these waters [United States Exclusive Economic Zone?] or over the sponge fishery [federal shrimp management plan?], is here involved." Id. at 76

The rationale in *Skiriotes* may very well be the rationale that was adopted by this Court in *Geer v. Connecticut*, 161 U.S. 519 (1896) which held that the use of wild animals within state boundaries could be limited to the citizens of one state to the exclusion of citizens of another. This Court overruled *Geer* in it's decision in *Hughes v. Oklahoma*, 444 U.S. 322 (1979).

In *Hughes v. Oklahoma*, and in this Court's recent Opinion in *Dennis v. Higgins*, 111 S.Ct. 865 (1991) Justice Jackson's Opinion in *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) was cited for the proposition that "our economic unit is the nation". In *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), this Court concluded that while the state may protect and conserve the natural resources available *within* its territorial boundaries, it may not discriminate among participants. The District Court was undoubtedly correct in concluding that Petitioners could not discriminate among participants in the harvest of federal natural resources of the United States Exclusive Economic Zone without offending the Equal Protection Clause of the Fourteenth Amendment.

The end of the applicability of *Skiriotes v. Florida*, 313 U.S. 69 (1941) by reason of "conflict with federal law" occurred at least as early as January 26th, 1976. At that

time the State of Florida and the United States entered into a "Joint Motion for Entry of a Decree" which was granted by this Court. *United States v. Florida*, 425 U.S. 791, 793 (1976). This Court decreed, as *stipulated* by the State of Florida, that:

> The United States is additionally entitled as against the State of Florida, to all the lands, minerals, and other natural resources underlying the Gulf of Mexico more than three marine leagues from the state's historic coastline (but not less than three geographic miles from its coastline), and *the State of Florida is not entitled to any interest in* such lands, minerals, and *resources*. (emphasis added) *United States v. Florida*, 425 U.S. at 793.

After this Court's decision in *U.S. v. Florida*, 425 U.S. 791 (1976), the United States Congress passed the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 et. seq. Congress provided at § 1812(1) for the exclusive federal fishery management authority over *all fish* within the Fishery Conservation Zone extending from the territorial limits of each coastal state seaward for a distance of two hundred (200) miles. On May 29th, 1981, the Gulf of Mexico Shrimp Fishery Management Plan, 50 C.F.R. § 658 et. seq. was developed under the Magnuson Act and implemented by the Secretary of Commerce. The Federal Shrimp Plan closed certain areas to shrimping . . . "within that portion of the Gulf of Mexico over which the United States exercises *exclusive* fishery management authority". (emphasis added) 50 C.F.R. § 658.1(b). Congress stated that the federal resources outside the territorial limits of the coastal states were to be treated as a *single uniformly regulated* resource for the benefit of all

citizens of the United States without regard to citizenship or state of incorporation. 16 U.S.C. § 1851(4).

The present conflict with federal law which this Court anticipated in *Skiriotes v. Florida*, 313 U.S. 69 (1941) now forbids state extraterritorial regulation. This conflict was specifically found by the District Court in its July 11th, 1989 Order. The Court held that:

> In this area, which is in dispute here, federal law permits shrimping, but the application of the Florida Statute prohibits Floridian fishermen from doing so. . . . Under the federal regulation, the Plaintiff may take shrimp in the disputed area, while under the state statute, he may not.

Skiriotes v. Florida, 313 U.S. 69 (1941) is not in conflict with the District Court's decisions which were Per Curiam Affirmed by the Eleventh Circuit.

CONCLUSION

The unpublished Opinion in *Sheffield* is not precedent of the Ninth Circuit under the Ninth Circuit's Rule 36-3. Since *Sheffield* cannot be "precedent" of the Ninth Circuit, then the Eleventh Circuit's Per Curiam Affirmance of the District Court's decision cannot be in "conflict" so as to form a basis for this Court's grant of Certiorari Review. Even if *Sheffield* was a published Opinion and could be relied upon as Ninth Circuit precedent, it is clear that this Court's intervening decisions in *Golden State* and *Dennis v. Higgins* have held that the rights, privileges and immunities violated by the Petitioners *are* actionable under § 1983. The Respondent as an individual who was injured by the Petitioners' State action and he had standing to sue

and obtain the injunctive and declaratory relief given by the District Court and affirmed by the Eleventh Circuit.

Finally, *Skiriotes v. Florida*, 313 U.S. 69 (1941) did not survive the joint stipulation Florida entered into with the United States which was recognized by this Court in *U.S. v. Florida* 425 U.S. 791 (1976). The State of Florida stipulated that it had *no interest* whatsoever in the natural resources beyond its boundaries and that such resources were subject to *exclusive* federal ownership and control on behalf of all United States citizens. The Magnuson Act, which was passed after this Court's 1976 decision in *U.S. v. Florida*, clarified that whatever fishery management occurred *at all*, in the United States Exclusive Economic Zone, would be federal. With regard to the management of federal fishery resources, state extraterritorial jurisdiction (over management of natural resources) under *Skiriotes v. Florida*, 313 U.S. 69 (1941) came to an end in 1976. The Writ must be denied.

Respectfully submitted,

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North Pacific Fishing Vessel Owners' Association, et al.,

Plaintiffs-Appellants,

v.

Bill Sheffield, Governor, State of Alaska, et al.,

Defendants-Appellees.

No. 87-3646

United States Court of Appeals, Ninth Circuit.
Argued and Submitted June 8, 1988.
Decided July 7, 1988.

D.Alaska
AFFIRMED.

[DO NOT PUBLISH]
[Respondent's Note: The following is excerpted from the unpublished opinion. Ninth Circuit Rule 36-3 prohibits citation in briefs, opinions, memoranda or orders.]

The District Court's original dismissal order was premised exclusively on Appellants' preemption claim. None of the other constitutional claims were mentioned. On January 21, 1987, after supplemental responses had been made by both parties, the District Court issued an order denying the Appellants' Motion for Attorney's Fees. The Court stated that, while Appellants had "prevailed on the merits," they had failed to state any cognizable Section 1983 claim. The Court also stated that it had relied primarily on the Supremacy Clause challenge in granting the temporary restraining order, and neither that claim nor any of Appellants' other claims sufficiently supported a request for attorney's fees under Section 1988.

* * *

Because Appellants' Magnuson Act, Supremacy and Commerce Clause claims are not actionable under Section 1983, the issue of substantiality for purposes of Section 1988 is never reached with regard to these claims. As for Appellants' remaining claims, while substantiality is relevant, the claims nonetheless fail. Each of these issues will be discussed in turn.

* * *

Appellants claim that they presented a substantial Section 1983 claim under a Commerce Clause theory is equally without merit. This Court noted in *White Mountain* that the Commerce Clause was analogous to the Supremacy Clause in that it functions as an "allocation of power between national and state governments,", 810 F.2d at 849, and does not create individual "rights, privileges, and immunities within the meaning of Section 1983." 810 F.2d at 850; accord *International Org. of Masters, Mates, and Pilots v. Andrews*, 831 F.2d 843 (9th Cir. 1987), cert. den. 108 S.Ct. 1228 (1988). Thus, Appellants' Commerce Clause claim also fails to support their Motion for Attorney's Fees . . .

From the plain language of the District Court's denial of their Motion, it is clear that Appellants prevailed on the merits of only their Supremacy Clause claims, which itself does not provide a basis for attorney's fees, costs, and expenses under Section 1988. Like their Supremacy Clause claim, Appellants' claims under the Magnuson Act and the Commerce Clause do not constitute cognizable Section 1983 claims. In addition, Appellants other unadjudicated constitutional claims fail, as they are not sufficiently supported in the record by their factual law.

Thus, we conclude that the District Court was correct in holding that Appellants are not entitled to attorney's fees, costs, and expenses under Section 1988.

Ninth Circuit Rule 36-3 (Do Not Publish – Opinions)

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this court or any District Court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the Doctrines of Law of the Case, Res Judicata, or Collateral Estoppel.